tiffs need proper drainage to enable water to flow out to the sea since they are low lying. Shanmugam himself admits that to enable water to flow from plaintiffs' land to the sea he had made an opening on the bund at Lot 3322. However he complained that because of the breach in the bund made by defendants and the canal they dug on Lot 3327, sea water would inundate that lot, as shown in photo Exhibit P18 twice monthly (at spring tides?). It is very likely that the enlarged culvert or breach shown in Exhibit D20 A and B, without a proper device to prevent sea water from flowing inwards may well aggravate flooding during spring tides, though in view of the existence of the canals even before this incident, and the breach in the bund on Lot 3322 made by Shanmugam, periodical inundation by sea water would I am certain have occurred to some degree even without defendants' interference.

However, the evidence of PW5 Mr. Nagalingam would tend to show that the trees on Lot 3327 said to have been planted in October, 1967 began to die about three years later *i.e.* at about the time of the incident, and that inundation had been the cause. I have no reason to doubt Mr. Nagalingam's conclusions and would therefore hold defendants liable for this item of damage, which according to his estimate, which I accept, would amount to $2,560.

As I had remarked earlier in this judgment I have not the slightest doubt that the defendants had brazenly, in complete disregard of plaintiffs' right of property not only entered upon the latter's property to dredge the existing canals, but had remained thereon despite Shanmugam's objection, and had through their servant the kepala resorted to threatening behaviour when Shanmugam had lawfully tried to take photographic evidence. Only police intervention had dissuaded them from prolonging the trespass. Exemplary damages are called for in such instances. As Devlin J. said in *Loudon* v. *Ryder*[1] such punitive damages could be awarded on the basis of "a fine which has to hit the defendant hard and to show that that sort of conduct does not pay".

In *Davis* v. *Bromley U.D.C.*[2] in which the defendant council wrongfully entered upon plaintiff's land and demolished a wall he was erecting thereon it was held that the measure of damages was not confined to the actual pecuniary loss sustained by plaintiff, but might also include compensation for matters of aggravation.

Whilst the trespass in *Loudon's* case, *supra*, somewhat more violent and physical in nature merited the award of £4,000 for combined assault and exemplary damages. I do not think that a sum of $2,000 for this flagrant disregard of proprietory rights would be unjust and accordingly, I award the plaintiffs the sum of $2,000 under this heading.

The plaintiffs are also granted the injunction sought in their second prayer and the costs of this action.

*Order accordingly.*

Solicitors: *N. Ramachandran & Co.; Lee Boon Peng & Co.*

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## LEE THEAN CHYE v. LIM CHOW CHONG

**[A.C.J. (Syed Agil Barakbah J.) January 8, 1973]**

**[Alor Star — Civil Appeal No. 8 of 1972]**

*Practice and Procedure — Defence — Failure to file defence in prescribed form — Defence given in letter — Irregularity — Whether defendant should be precluded from defending the action — Subordinate Courts Rules, 1950, O. 10 rr. 3(1), 4 and 7.*

The respondent brought a claim against the appellant for arrears of rent. The defence was not filed within the time required and the learned magistrate gave the appellant time to file the defence within a week. Subsequently the appellant filed a statement of defence in the form of a letter addressed to the magistrate and a certified copy to the respondent's solicitors. When the case came up for trial, the learned magistrate made an order precluding the appellant from defending and gave judgment in favour of the respondent with costs. The appeallant appealed.

**Held:** (1) the failure to comply with the requirements of Order 10 rule 3(1) of the Subordinate Courts Rules in not filing a defence in the prescribed form was an irregularity which could be cured;

(2) the learned magistrate in this case ought to have proceeded with the hearing and if he was of opinion that the statement of defence should be submitted in the proper form, he could have adjourned the case for the purpose;

(3) the appeal should therefore be allowed and the appellant ordered to submit a statement of defence in the proper form within a week.

*Cases referred to:*

(1) *Foo Chiew Fong* v. *Guriman* [1957] M.L.J. 51.

(2) *Abdul Rahman* v. *Paijah* [1937] M.L.J. 93.

(3) *Grey* v. *Kong* 1 F.M.S.L.R. 162.

CIVIL APPEAL.

*Karpal Singh* for the appellant.

*Tan Seng Jim* for the respondent.

**Syed Agil Barakbah J.** (delivering oral judgment): This is an appeal against the decision of the learned magistrate, Langkawi, given on the 22nd day of March, 1972, in favour of the respondent (plaintiff in the court below). Judgment was given against the appellant (defendant in the court below) in the sum of $305 and costs, on a claim by the respondent for four years' rent amounting to $265 and eight months' rent of a lean-to shed situated on the land belonging to the respondent in the sum of $40.

There are two grounds of appeal. The first ground is that the learned magistrate erred in law in precluding the appellant from defending the action on the ground that the defence was not in proper form under O.10 r.3(1) of the Subordinate Courts Rules; and, secondly, in not considering that the appellant had a *prima facie* defence.

Now, O.10 r.3(1) states: —

"If a defendant desires to defend the whole or any part of the claim he shall, not less than two days before the return date on the summons, or within such further time and on such terms as the court may allow, file and cause to be served on each plaintiff a defence in Form 6. A set-off may be pleaded by way of defence."

O.10 r.7 states that if a defence is not filed or does not disclose any defence to the claim or is not in proper form, the court may in its discretion direct that the party in default be precluded from defending the claim. The sequence of this case as noted by the learned magistrate is that the defence was not filed

within the time required. The appellant was given time to file the defence within a week after the magistrate was satisfied that there was a valid defence. Subsequently, the appellant filed a statement of defence in the form of a letter addressed to the magistrate and a certified copy to the respondent's solicitors. Thereafter the respondent's solicitors wrote to the appellant by A.R. Register informing him that the defence was not in proper form and requesting him to file a defence in the proper form, otherwise they would apply to the court to have the defence struck out.

On March 22, 1972, when the case came before the learned magistrate, on the application by the respondent's counsel the magistrate made an order precluding the appellant from defending and gave judgment in favour of the respondent with costs.

Now, the accepted principle that has been followed in the matter of procedure is that courts prefer that cases should be decided on their merits and do not invoke procedural rules to prevent a defendant from defending an action unless the defendant has no merits in his defence. (Principle as quoted in *Foo Chiew Fong* v. *Guriman*[1]).

On scrutiny of the letter which has been filed (page 10 of record), it appears that the form of defence as required under O.10 r.4 of the Subordinate Courts Rules has been complied with. Mr. Tan for the respondent does not object as to the use of the national language in view of the National Language Act, 1963, except of course for the letter being addressed to the magistrate and being copied to the solicitors for the respondent. The letter admits part of the claim totalling $125 but not to the full claim of $305 and gives reasons for the same. In my view, there is a triable issue which merits full hearing regarding the balance sum not admitted and as envisaged by the learned magistrate earlier there was a valid defence.

The requirement of O.10 r.3(1) needs further scrutiny especially in the light of reported authorities on the matter. No doubt that Order is mandatory because of the word "shall", but in *Abdul Rahman* v. *Paijah*,[2] Terrell Ag. C.J. dealt with a similar point under section 96 of the Civil Procedure Code (Cap. 7). There the respondent submitted a written statement which was not verified under the requirements of that section. It was held that such failure was an irregularity which could be cured at any time. The case of *Grey* v. *Kong*,[3] was cited. In that case the defendant never appeared on receipt of summons but merely wrote a letter to the registrar stating, by way of defence, that the suit was barred by limitation. The Court of Appeal held that effect should be given to the plea and treated the letter as a "written statement" within the meaning of section 87 of the Civil Procedure Code 1902, which is equivalent to section 91 of the Civil Procedure Code. (F.M.S. Cap. 7).

Now, section 96 of the Civil Procedure Code contains a mandatory requirement that written statements shall be signed and verified in the manner provided for signing and verifying claims as provided in the earlier sections. Such statement shall not be received by the court unless it is so signed and verified. In view of these authorities, I am of the considered opinion that non-compliance merely as to form as required by O.10 r.3(1) of the Subordinate Courts Rules is an irregularity which can be cured. The magistrate ought to have proceeded with the hearing, and if he was of the opinion that the statement of defence should be submitted in the proper form, he could have adjourned the case for the purpose and order the appellant to pay the costs. I think this is a proper case where the epithet "that the rules of procedure should be the handmaiden and not the master" be applied.

The appeal is therefore allowed, the judgment is set aside, the appellant is ordered to submit a statement of defence in the proper form within one week from the date of the order and the case is remitted to the learned magistrate, Langkawi, for a full hearing.

I order the appellant to pay the costs of the hearing before the magistrate on March 22, 1972.

As regards this appeal, there is no order as to costs.

*Appeal allowed.*

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## LEE KIM MAN v. CHIN KON SANG

**[O.C.J. (Lee Hun Hoe J.) January 12, 1973]**

**[Kota Kinabalu — Civil Suit No. 219 of 1972]**

*Practice and Procedure — Specially indorsed writ — Whether available for actions in negligence — R.S.C. 1957, O. 3, r. 6.*

In this case the defendant applied to set aside a specially indorsed writ of summons on the ground that the writ contained a claim for damages for negligence under the Civil Law Act, 1956.

**Held,** the plaintiff was entitled to have his writ specially indorsed under Order 3 rule 6(1) of the Rules of the Supreme Court and therefore the application in this case must be dismissed.

*Cases referred to:-*

(1) *Lee Chin Ho* v. *Lim Mah Chye* Penang Suit No. 140 of 1912.

(2) *Kong Kim Ching* v. *Hassan bin Dia & Ors.* Ipoh Civil Suit No. 5 of 1971.

(3) *Dummer* v. *Brown & Anor.* [1953] 1 Q.B. 710.

CIVIL SUIT.

*Chong Thian Vun* for the plaintiff.

*Shelley Yap* for the defendant.

**Lee Hun Hoe J.:** This is an application by defendant by way of Summons-in-Chambers to set aside the specially indorsed writ of summons and the service thereof and all subsequent proceedings on the ground that the writ was not indorsed in accordance with Order 3 rule 3 of the Rules of the Supreme Court. It was stated that the statement of claim indorsed in the writ in the present proceedings contains a claim for damages under the Civil Law Act, 1956 for the death of Lee Tua Peck alias Lee Twa Teck from injuries allegedly caused by the negligent driving of the defendant and is excepted from the provision of Order 3 rule 6. Consequently the indorsement on the writ was not in accordance with Order 3 rule 3.